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No. 09-1067

JUL 9 - 2010

In The

Supreme Court of the United States

LAURIE D. MCFADIN, D/B/A TWO BAR WEST; STACY L. MCFADIN, D/B/A TWO BAR WEST,

Petitioners,

v.

LYNN GERBER, D/B/A FOXY ROXY'S, D/B/A ETERNAL PERSPECTIVE HANDBAGS; WILLIAM GERBER, II, D/B/A FOXY ROXY'S, D/B/A ETERNAL PERSPECTIVE HANDBAGS; CONNIE GRENEMYER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT GRENEMYER'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Fifth Circuit Court of Appeals correctly determine that the United States District Court for the Western District of Texas lacks personal jurisdiction over Respondent Connie Grenemyer?

2. Were the Petitioners entitled to conduct jurisdictional discovery before the district court determined the issue of personal jurisdiction?

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COUNTERSTATEMENT OF THE CASE

Respondent, Connie Grenemyer ("Grenemyer"), takes no issue with Petitioners' statement of the case as it pertains to the procedural history of the proceedings below. Petitioners' statement, however, distorts certain facts that are material to the consideration of the jurisdictional questions presented. Accordingly, Grenemyer re-summarizes the facts based on the findings of the lower courts.

Grenemyer is a resident and citizen of Colorado who is self-employed as an independent wholesale sales representative. (App. 2a).[1] She operates her business out of a showroom at the Denver Merchandise Mart in Denver, Colorado, where she displays and represents merchandise of various designers and manufacturers of women's accessories. (App. 2a-3a, 22a). Grenemyer has always limited her sales-representation territory to states within the Rocky Mountain region, (App. 2a, 9a-10a), traveling at times outside of Colorado to retail stores and wholesale markets in Arizona, Idaho, Montana, New Mexico, Utah, and Wyoming. (App. 2a-3a).

Grenemyer has never traveled to Texas to conduct business or for any other purpose. (App. 3a,

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[1] The lower courts' opinions are included in Petitioners' Appendix ("App."). For clarity and consistency, all citations to the Fifth Circuit's opinion below will be to the Appendix instead of the official publication at *McFadin v. Gerber*, 587 F.3d 753 (5th Cir. 2009).

9a-10a). In fact, she became Petitioners' sales representative without visiting or even contacting them in Texas. Instead, Petitioners' former Colorado sales representative passed on the relationship to Grenemyer in Colorado. (App. 3a). Subsequently, the Petitioners traveled to Denver to formalize their relationship with Grenemyer for the purpose of expanding markets for their handbags outside of Texas. (App. 3a, 9a).

Pursuant to their agreement, Petitioners provided Grenemyer with samples of their Two Bar West handbags for her to display in her showroom and on her sales trips within her Rocky Mountain territory. Grenemyer took the orders of retailers who visited her showroom in Denver or whom she encountered during her regional sales trips. After sending orders to the Petitioners, her involvement with the orders ended. The Petitioners processed the orders and shipped the merchandise directly to the retailers. (App. 3a).

The Petitioners paid Grenemyer a twelve-percent (12%) commission on all sales she made to retailers located within her Rocky Mountain territory. They paid her only a six-percent (6%) commission on sales made to retailers located outside of her territory, including any sales made to Texas retailers. Petitioners mailed Grenemyer's commission checks to her in Colorado. (App. 3a). Over the course of ten years, only about $40,000 of Grenemyer's orders (less than 4%) came from retailers based in Texas. Grenemyer, however, took none of those orders in Texas. Rather,

they resulted from Texas retailers contacting Grenemyer or traveling to her Colorado showroom or to one of the markets she attended within her territory. (App. 3a, 33a).

Petitioners traveled to Colorado in January 2008 and terminated their relationship with Grenemyer at the Denver Merchandise Mart. (App. 3a). As a result, a dispute arose over commissions that Grenemyer claimed Petitioners still owed, and she refused to relinquish Petitioners' samples until the dispute could be resolved. (App. 3a-4a). This dispute formed the basis for Petitioners' claims that Grenemyer breached their contract and converted their samples. (App. 4a, 32a).

Following her termination, Lynn and William Gerber ("the Gerbers"), who manufacture buffalo handbags under the name Eternal Perspectives, hired Grenemyer to represent their product line. (App. 4a-5a). Grenemyer, however, does not manufacture the Gerbers' Eternal Perspective products. (App. 35a). Even though the Gerbers posted photographs of their products and contact information on their websites, including Grenemyer as their sales representative, (App. 5a), Grenemyer used no website to sell the Gerbers' products or the products of her other clients, (App. 3a). Any Eternal Perspective sales that Grenemyer made were the result of retailers contacting or visiting Grenemyer at her showroom in Colorado or at a market or show within Grenemyer's Rocky Mountain territory. (App. 5a). In fact, she only sold Eternal Perspective products to buyers in Colorado,

Montana, Wyoming, Arizona, and New Mexico. (App. 39a).

Jason Brockman ("Brockman"), who was also an independent wholesale sales representative – completely separate and distinct from Grenemyer, (App. 11a, 37a) – arranged to attend a merchandise show at the Dallas Market Center in Dallas, Texas in March 2008. (App. 5a, 37a). Because Grenemyer never attends the Dallas show, she allowed Brockman, at his request, to take samples of some of the merchandise she regularly represented, including samples of the Gerbers' Eternal Perspective line, to display at the show. She did not direct Brockman to attend the show, (App. 11a-12a, 37a), nor did she pay for or contribute to the costs of his trip, (App. 5a, 37a). On occasion, Brockman and Grenemyer would act as sub-representatives at shows the other did not attend. In such cases (and in the case of the Dallas show), the sub-representative (Brockman) would receive a ten-percent (10%) commission on any sales, while the main representative (Grenemyer) received a gratuitous two-percent (2%) over-ride commission. (App. 5a-6a, 12a). Of the orders for Eternal Perspective handbags that Brockman wrote as a result of the Dallas show, only six of them were to Texas-based retailers, and none of them were large enough to be considered new accounts. (App. 6a). The Gerbers, not Grenemyer, filled the orders, (App. 12a), and paid Brockman directly for the commissions he earned from the Dallas show. (App. 6a). The Fifth Circuit

specifically found that Brockman was not acting as Grenemyer's agent. (App. 11a n.27).

REASONS FOR DENYING THE WRIT

Supreme Court review on a writ of certiorari is wholly discretionary – to be granted for only the most compelling reasons. Sup. Ct. R. 10. While conflicting decisions between two or more circuit courts of appeal on the "same important matter" represent one type of situation that this Court may consider, Supreme Court review and intervention nevertheless remains soundly within the Court's discretion. *See* Sup. Ct. R. 10(a). Moreover, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Petitioners argue that a split exists among the circuit courts on the meaning and application of the "effects test" announced in *Calder v. Jones*, 465 U.S. 783 (1984), for tort-based personal jurisdiction. (*See* Pet. 12-22). They also seem to suggest, without showing, that there are other circuit splits involving the rule from *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and contract-based personal jurisdiction. (*See* Pet. 23-27).

There are no compelling reasons, however, for granting certiorari in this case. As revealed in turn below, different factual circumstances primarily account for different outcomes among the various

circuit courts that have applied the *Calder* "effects test." Variations among the circuits in interpreting *Calder*'s breadth do not signal the kind of circuit split, if any, to warrant this Court's intervention. Given the facts of this case, the Fifth Circuit's determination that the district court in Texas lacked personal jurisdiction over Grenemyer is correct. Even if the Fifth Circuit somehow misapplied applicable jurisdictional principles, any such error is harmless because the court's ultimate conclusion is also supported on reasonableness and fairness grounds.

I. Any perceived "split" among the circuit courts in the application of *Calder* is the result of factual variation.

A. The analysis for personal jurisdiction is highly fact-specific.

In discussing the fact-driven nature of the minimum contacts analysis, the Second Circuit observed, "There is no talismanic significance to any one contact or set of contacts that a defendant may have with a forum state; courts should assess the defendant's contacts as a whole." *Metropolitan Life Insurance Co. v. Robertson-CECO Corp.*, 84 F.3d 560, 570 (2d Cir.), *cert. denied*, 519 U.S. 1006 (1996). Indeed, as this Court's jurisprudence on personal jurisdiction has developed over the years, one principle has remained constant: the inquiry into personal jurisdiction turns entirely on the facts and context of each case. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 319-20 (1945) (rejecting "mechanical or

quantitative" tests and analyzing defendant's connections to the state for unemployment tax purposes); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-97 (1980) (analyzing defendants' lack of connections to Oklahoma and stating that the critical foreseeability analysis is that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"); *Calder*, 465 U.S. at 788-89 (reciting that in determining minimum contacts, "a court properly focuses on 'the relationship among the defendant, the forum, and the litigation'" and analyzing defendants' activities directed at California); *Burger King*, 471 U.S. at 485-86 (again rejecting "talismanic jurisdictional formulas" and recognizing the necessity of weighing the facts of each case); *Asahi Metal Industries Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 113-14 (1987) (applying the due process reasonableness factors to the facts).

B. There is no conflict or "split" as to the applicable law.

With respect to *Calder*, the Fifth Circuit stated that "the effects doctrine is not as expansive as the McFadins argue." (App. 11a). Specific acts must be directed at the forum – not simply foreseeable injury. (*Id.*). Thus, the Fifth Circuit took a more restrictive approach to *Calder*'s effects test.

While different courts will always interpret various legal rules and principles differently – some

more broadly or narrowly than others – such differences do not constitute a split or conflict. For example, this case does not present a situation in which one court has upheld a statute or regulation while another court has invalidated it. *See, e.g., Bingler v. Johnson*, 394 U.S. 741, 747-48 (1969) (noting that certiorari was granted to resolve a conflict among the circuits concerning the validity of a Treasury Department regulation). More to the point here, no circuit has rejected *Calder* as being bad law while other circuits continue to apply it. In fact, the Fifth Circuit quoted *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 212 (5th Cir. 1999), as support for its restrictive application of *Calder*. (App. 11a n.26). Irrespective of the limitation in *Wien Air*, the facts of the case revealed that the defendant had directed specific acts at Texas, thereby supporting the assertion of personal jurisdiction over him. *See* 195 F.3d at 212-14. Thus, the facts determined the jurisdictional outcome. *See id.*

Petitioners boldly assert that the Seventh, Ninth, Tenth, or Eleventh Circuit Courts would have reached a different result than the Fifth Circuit. (Pet. 15). This assertion is irrelevant not only because it is impossible to test, but also because at least one or more of the facts and circumstances in the cases cited by the Petitioner involved directed activities supporting the exercise of personal jurisdiction over the defendants. In other words, the varying outcomes are the result of varying facts.

1. Seventh Circuit

In *Indianapolis Colts, Inc. v. National Football League Properties, Inc.*, 34 F.3d 412 (7th Cir. 1994), the infringement claims involved two national football teams, the Indianapolis Colts and the Baltimore Colts, who shared identical team mascot names – the Colts. *See id.* at 411. In determining that jurisdiction over the Baltimore Colts was proper, the Seventh Circuit recognized that in *Calder* and other cases asserting jurisdiction in intellectual property matters, "the defendant had done more than brought about an injury to an interest located in a particular state. The defendant had also 'entered' the state in some fashion. . . ." *Id.* at 412. The court found that the nationwide broadcast of the Baltimore Colts' games constituted the necessary entry into the forum. *See id.* at 411-12.

Connie Grenemyer, by contrast, never physically entered Texas, nor did she direct the sale of any allegedly infringing handbags or any other activity into Texas. (App. 11a). She also limited her sales activities to Colorado and her Rocky Mountain territory. (App. 2a, 9a-10a). Thus, she did not engage in sales activities purposefully designed to target the entire nation, much less Texas.

Petitioners also ascribe importance to the outcome in *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997). (*See* Pet. 16-17). The critical fact in this case was not unspecified injury to the plaintiff in Illinois over the infringement dispute. Rather, it was

the fact that the defendant threatened one of plaintiff's customers with legal action, causing the customer to cancel its order of plaintiff's product. Even though the customer was not located in Illinois, the defendant nevertheless accomplished its goal of reducing plaintiff's sales in Illinois – a very real and specific injury directed at the forum. *See also Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1075 (10th Cir. 2008) (discussing a similar "bank shot" effect).

Petitioners here, however, never alleged or provided any facts showing a direct link between Grenemyer's allegedly infringing activities outside of Texas that resulted in any cancellations of their product orders or otherwise caused a diminution in their sales in Texas.

2. Ninth Circuit

Panavision International, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998), involved the use and registration of plaintiff's trademarked name, "Panavision," as defendant's Internet domain name. *See id.* at 1319. In determining that personal jurisdiction in California over the defendant was appropriate, the Ninth Circuit found that the defendant had engaged in "something more"[7] than simply registering

[7] The Ninth Circuit relied on and distinguished the facts of its earlier decision, *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), regarding the need for "something more" in the

(Continued on following page)

plaintiff's trademark as an Internet domain name. He had purposefully directed his conduct to California by attempting to extort money from plaintiff to release the domain name.[3] *See id.* at 1322. Even assuming that Petitioners' allegations of infringement were true, Grenemyer did not engage in "something more" than the alleged infringement itself.

Petitioners have argued that Brockman's attendance and sales made at the Dallas market suffice, but as both the district court and Fifth Circuit found, Grenemyer did not direct or control Brockman's activities in Texas. (App. 11a, 23a, 36a-38a).

3. Tenth Circuit

Petitioners cite *Dudnikov*, 514 F.3d 1063, as support for their contention that the Tenth Circuit would apply *Calder* more favorably to them. (*See* Pet. 17-18 n.68). In analyzing *Calder*, the Tenth Circuit noted that its holding "required more than an intentional action. It also stressed that the defendants' conduct was 'expressly aimed at [the forum].'"

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context of trademark infringement over the Internet. *See Panavision*, 141 F.3d at 1320-21.

[3] The *Panavision* defendant's registration of Internet domain names using well-known trademarks and his demands for payment to release the domain names were more than mere allegations. This was his business practice and the subject of another nearly identical lawsuit. *See Panavision*, 141 F.3d at 1325 (discussing *Intermatic Inc. v. Toeppen*, 947 F.Supp. 1227 (N.D.Ill. 1996)).

Dudnikov, 514 F.3d at 1074 (quoting *Calder*, 465 U.S. at 789). Even though the defendants acted to shut down plaintiffs' eBay auction by submitting a notice to eBay in California, the Tenth Circuit found that California was the "bank shot" by which plaintiffs' business in Colorado was the ultimate goal. *See* 514 F.3d at 1075. In other words, the defendants expressly aimed their conduct at Colorado by first deflecting it through California. *See id.* Again, Grenemyer aimed none of her conduct at Texas, either directly or indirectly. (App. 11a, 23a, 36a-38a).

With respect to the Petitioners' belief that their case would have been decided differently in the Tenth Circuit, it is worth noting that the Tenth Circuit, like the Fifth, takes a more restrictive approach to *Calder*, "holding that the forum state itself must be the 'focal point of the tort.'" *Dudnikov*, 514 F.3d at 1074 n.9 (quoting *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995)). Additionally, the Tenth Circuit has reviewed *Calder* and cases from several circuits applying it, *see Far West*, 46 F.3d at 1077-79, and concluded:

> [T]he mere allegation that an out-of-state defendant has tortiously interfered with contractual rights or has committed other business torts that have allegedly injured a forum resident does not necessarily establish that the defendant possesses the constitutionally required minimum contacts. Instead . . . a court must undertake a *particularized inquiry* as to the extent to which the

> defendant has purposefully availed itself of the benefits of the forum's laws.

Id. at 1079 (emphasis added). Thus, the Tenth Circuit's restrictive interpretation of *Calder* is consistent with the majority of other circuit courts.[4] As such, the Petitioners' seem misguided in their confidence that the Tenth Circuit is among the "splitting" circuits that would have found in their favor.

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[4] The court in *Far West*, 46 F.3d at 1078-79, discussed intentional tort cases, where personal jurisdiction was lacking, from the Fifth, Sixth, and Seventh Circuit Courts: *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763 (5th Cir. 1988) (tortious interference with contract and business relations); *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir.), *cert. denied*, 513 U.S. 962 (1994) (tortious interference with business relations); *Wallace v. Herron*, 778 F.2d 391 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (malicious prosecution).

Since the *Far West* opinion was delivered, the First, Second, Third, Fourth, and Fifth Circuits have applied *Calder* to intentional tort cases without finding a basis for personal jurisdiction. *See, e.g., United States v. Swiss American Bank, Ltd.*, 274 F.3d 610 (1st Cir. 2001) (conversion); *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018 (2d Cir. 1997), *cert. denied*, 522 U.S. 1149 (1998) (defamation); *Imo Industries, Inc. v. Kiekert AG*, 155 F.3d 254 (3rd Cir. 1998) (intentional business interference); *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (copyright infringement); *Allred v. Moore & Peterson*, 117 F.3d 278 (5th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998) (abuse of process and malicious prosecution).

4. Eleventh Circuit

Similarly, *Licciardello v. Lovelady*, 544 F.3d 1280 (11th Cir. 2008), involved critical facts not present in the Petitioners' case against Grenemyer. (*See* Pet. 17). The particular infringement in that case was the posting of a Florida musician's trademarked name and photograph on a website maintained by the musician's former manager. *See Licciardello*, 544 F.3d at 1282. Although the manager created the website in Tennessee where he lived, the website was accessible in Florida. *See id.* at 1283. The Eleventh Circuit found that the manager's purpose for posting the musician's name and likeness on the website was to make money on the implied endorsement of the musician. *See id.* at 1287-88. Importantly, however, the court strictly limited its holding to the specific facts before it:

> We hold only that where the internet is used as a vehicle for the deliberate, intentional misappropriation of a specific individual's trademarked name or likeness and that use is aimed at the victim's state of residence, the victim may hale the infringer into that state to obtain redress for the injury.

Id. at 1288 n.8.

Grenemyer, on the other hand, maintained no website on which to post, much less sell, any trademarked names or likenesses. (App. 3a).

C. The Fifth Circuit's interpretation of *Calder* is consistent with that of the clear majority of circuit courts.

In summary, these factually diverse cases do not signal a conflict as to the law or applicability of *Calder*. Even if they did, the Fifth Circuit's more restrictive application of *Calder* places it among the clear majority of circuit courts composed of at least the First, Second, Third, Fourth, Fifth, Sixth, and, as discussed above, the Seventh and Tenth.[5] Any irregularities or deviations in the application of *Calder* among the remaining circuits will likely be resolved over time. If not, a more compelling case for this Court's review should come from one of the minority circuits.

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[5] Petitioners do not cite or discuss any cases from the D.C. Circuit, and they cite only a single case from the Eighth Circuit, *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384 (8th Cir. 1991), without analyzing it. (Pet. 21 n.85). The Eighth Circuit found that asserting personal jurisdiction over the California defendant was proper because of a number of facts indicating that the defendant had prior knowledge that its trademark was infringing and that the defendant's infringing products were not only sold in South Dakota, but also that the defendant directly shipped them there. *See Dakota*, 946 F.3d at 1390. In the Eighth Circuit, like the others, different jurisdictional facts produce different jurisdictional results. *See, e.g., Coen v. Coen*, 509 F.3d 900, 906 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2949 (2008) (finding no personal jurisdiction over foreign defendants accused of fraud).

D. *Burger King*'s facts are distinguishable.

The different outcomes between this case and *Burger King*, 471 U.S. 462, are again the result of distinguishable facts and circumstances. First and foremost, the contract at issue in *Burger King* was an extensive franchise agreement that included a 20-year licensing and leasing agreement, *see id.* at 464, 480, not a mere sales representation commission agreement containing no similar terms. Furthermore, the defendant in *Burger King*, unlike Grenemyer, purposefully sought out and applied to the franchisor in Florida. *See id.* at 466, 479-80. The defendant was also required to make contractual payments to the franchisor in Florida. *See id.* at 465-66, 480. By contrast, Petitioners made contractual commission payments to Grenemyer in Colorado. (App. 3a). Finally, the contract in *Burger King* contained a Florida choice-of-law provision. *See* 471 U.S. at 466, 481. There has been no allegation that any such provision existed in Grenemyer's sales representation agreement with Petitioners. (*See* Pet. 2-3). Therefore, the Fifth Circuit's opinion does not represent a split in the application of *Burger King*, but rather a distinctive set of facts and circumstances.

II. Due Process concerns do not support the exercise of personal jurisdiction over Grenemyer in Texas courts.

The Fifth Circuit's opinion below is well-reasoned and demonstrates that, based on the undisputed facts

of this matter as applied to the specific jurisdiction analysis,[6] Connie Grenemyer lacks the minimum contacts with Texas necessary to require her to defend the Petitioners' claims there. (App. 1a-12a). Consistent with the Fifth Circuit's opinion are the district court's opinion, (App. 20a-23a), and the magistrate's Report and Recommendation, (App. 26a-40a).

If, however, there were some irregularity in the Fifth Circuit's minimum contacts analysis, the ultimate conclusion would be the same after analyzing the third prong of the specific jurisdiction inquiry – the fairness and reasonableness of exercising jurisdiction.[7] The "traditional notions of fair play and substantial justice" articulated in *International Shoe*, 326 U.S. at 316, were subsequently rearticulated in terms of five reasonableness factors: (1) the burden on the defendant in having to litigate in the forum, (2) the forum's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of

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[6] As the Fifth Circuit noted, Petitioners acknowledged that only specific jurisdiction applies in this case. (App. 7a, 8a). The Fifth Circuit applied the three-step analysis for specific jurisdiction set forth in *Seiferth v. Helicopteros Atunero, Inc.*, 472 F.3d 266, 271 (5th Cir. 2006): (1) whether the defendant has minimum contacts with the forum; (2) whether plaintiff's claims arise out of or result from the defendant's contacts with the forum; and (3) whether it is fair and reasonable to exercise personal jurisdiction over the defendant. (App. 7a n.9).

[7] *See supra* note 6.

controversies, and (5) the shared interest of the states in furthering substantive social policies. *World-Wide Volkswagen*, 444 U.S. at 292; *see also Asahi*, 480 U.S. at 113-14 (a majority of the Supreme Court joined in applying the reasonableness factors and finding that asserting jurisdiction over the defendant would be unreasonable).

Even though the Fifth Circuit did not reach the reasonableness factors as it concluded Grenemyer did not have the requisite minimum contacts, (App. 10a, 12a), the district court and magistrate judge did consider those factors for Petitioners' contract and tort claims. (App. 23a, 31a-34a, 38a-40a). With respect to the contract claim, the magistrate considered the following facts dispositive: Grenemyer refused to return Petitioners' sample bags in Colorado, (App. 32a); Petitioners initiated the sales representation agreement with Grenemyer in Colorado, (App. 32a); Petitioner Laurie McFadin attested that one of the main reasons for hiring Grenemyer as their sales agent was because she attended far-away trade shows outside of Texas, (App. 32a-33a); and the less-than 4% sales made to Texas buyers were the result of those buyers contacting Grenemyer within her Rocky Mountain sales territory, (App. 33a). With respect to the tort claims, the magistrate noted the thrust of the Petitioners' infringement claims – that Eternal Perspective is selling infringing handbags, not that those bags are being sold in Texas. (App. 39a). As for Grenemyer's involvement, she attested that her Eternal Perspective sales had been made only to buyers from

Colorado, Montana, Wyoming, Arizona and New Mexico. (App. 39a). After weighing these facts against the reasonableness factors, the magistrate concluded that the burden on Grenemyer in having to defend in Texas would be greater than the Petitioners' interest in litigating there. (App. 33a-34a). The district court agreed, noting that the alleged breach of contract did not occur in Texas, that Grenemyer directed none of her sales to Texas, and that only a handful of Eternal Perspective handbags were even sold in Texas. (App. 23a). Related to this conclusion was the fact that this case has more connections to Colorado than to Texas, including the fact that the Petitioners operate their own showroom at the Denver Merchandise Mart, (App. 34a), and that the Petitioners contracted with Grenemyer because she traveled to areas far outside of Texas, (App. 39a).

The personal jurisdiction analysis is concerned with due process and fairness to the nonresident defendant – not the plaintiff. The burden on the defendant is "always a primary concern. . . ." *World-Wide Volkswagen*, 444 U.S. at 292. Thus,

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its laws to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 294; *accord Burger King*, 471 U.S. 477-78 ("minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities"); *Asahi*, 480 U.S. at 121 (Stevens, J., concurring) (arguing that where the exercise of jurisdiction would be unreasonable and unfair, the minimum contacts analysis is not required). Therefore, because it would be unfair and unreasonable to force Grenemyer to defend the claims in Texas, reversal or remand concerning any error in the Fifth Circuit's minimum contacts analysis is not warranted. The end-result would remain the same.

In addition to moving for dismissal for lack of personal jurisdiction at the district court level, Grenemyer also moved to transfer venue. (App. 6a, 28a). That motion, however, was denied as moot. (App. 24a). "[I]n certain cases, many of the inconveniences created by subjecting a nonresident defendant to the court's jurisdiction can be cured by a change of venue. . . ." *Metropolitan Life*, 84 F.3d at 575. Thus, if the dismissal were reversed or vacated and remanded, Grenemyer would likely renew her motion for change of venue pursuant to 28 U.S.C. § 1404. A transfer of the case to Colorado is not only supported by the numerous and strong Colorado connections discussed above, but also by a lawsuit involving these same parties, pending in the United States District

Court for Colorado ("the Colorado case").[8] Grenemyer initiated the Colorado case to recover commissions she claims the Petitioners still owe her pursuant to Colorado's Wholesale Sales Representatives statute, Colo. Rev. Stat. § 12-66-101 *et seq.* (2009). The Colorado case already provides a proper venue and proceeding for the Petitioners to assert their claims against Grenemyer even with the dismissal of the instant matter. Likewise, it provides a basis for transfer to Colorado and consolidation in the event of a reversal or remand. For these reasons, granting certiorari to review or remand this case is not in the interest of the Supreme Court.

III. The Supreme Court's denial of certiorari in other similar cases reveals that the issues here are not compelling.

There have been several prior instances in which this Court has declined review of dismissals for lack of personal jurisdiction where intentional torts were alleged and *Calder* was analyzed. *See Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir.), *cert. denied*, 129 S. Ct. 63 (2008) (discriminatory constitutional violation); *Coen v. Coen*, 509 F.3d 900, 906 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2949 (2008) (fraud); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293

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[8] *See Grenemyer v. McFadin*, No. 08-cv-02156-MSK-CBS (D. Colo. filed Sept. 10, 2008). The Colorado case has been stayed pending the exhaustion of appeals in the instant matter.

F.3d 707 (4th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (infringement); *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018 (2d Cir. 1997), *cert. denied*, 522 U.S. 1149 (1998) (defamation); *Allred v. Moore & Peterson*, 117 F.3d 278 (5th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998) (abuse of process and malicious prosecution); *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir.), *cert. denied*, 513 U.S. 962 (1994) (defamation and tortious interference with business relations); *Wallace v. Herron*, 778 F.2d 391 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (malicious prosecution).

The case most factually analogous to the instant action is *ALS Scan*, 293 F.3d 707. A Maryland-based copyright owner of certain adult photographs sued a Georgia-based Internet Service Provider ("ISP") that provided bandwidth to a company that posted and sold the owner's photographs on the company's website. *See id.* at 709. The suit was brought in Maryland. *See id.* Applying a specific jurisdiction analysis, *see id.* at 711-12, the Fourth Circuit determined that the first two-prongs of the test (purposeful availment and relatedness of claims to contacts) were not met, and that personal jurisdiction over the defendant in Maryland was not proper, *see id.* at 714-15. The Fourth Circuit analogized contacts through electronic media to *Calder's* application of standard due process principles, holding that "specific jurisdiction in the Internet context may be based only on an out-of-state person's Internet activity directed at [the forum state]

and causing injury that gives rise to a potential claim cognizable in [the forum]." *Id.* at 714.

Even though the instant case does not involve any Internet activity, other than the fact that the Gerbers had a website that allegedly named Grenemyer as their Eternal Perspective sales representative, (App. 3a, 5a), it is nevertheless factually similar to *ALS Scan*. Petitioners claim to own trademarked handbags. Grenemyer made it possible for potential buyers to view and purchase Eternal Perspective handbags at her Denver showroom or other trade shows within her territory. Texas buyers, however, could not purchase any Eternal Perspective products from Grenemyer in Texas; they had to make contact with Grenemyer at her Denver, Colorado showroom or at one of the trade shows she attended in her territory. Grenemyer did not target Texas for sales or otherwise direct her sales into Texas.

The instant case falls into the same category of similar prior cases that the Supreme Court declined to review. As such, it does not implicate any compelling reason for review, and the Supreme Court should deny certiorari in this matter.

IV. Whether to allow jurisdictional discovery is a discretionary matter.

Petitioners also seek this Court's review of the district court's denial of their request for jurisdictional discovery. (Pet. 27-29). The district court denied the requested discovery, (App. 23a-24a), based on the

magistrate's conclusion that there were no material issues of fact to warrant the discovery, (App. 39a-40a).

District courts have broad discretion as to whether to allow jurisdictional discovery. *See Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1981); *accord United States v. Swiss American Bank, Ltd.*, 274 F.3d 610, 625-26 (1st Cir. 2001). Jurisdictional discovery is only warranted where there are issues of fact. *See Wyatt*, 686 F.2d at 284. Discovery orders on such matters will not be disturbed absent a clear abuse of discretion, *see id.* at 283, and plain error, *see Swiss American*, 274 F.3d at 626. Thus, no automatic entitlement to such discovery exists.

The Fifth Circuit's opinion in *Walk Haydel & Associates, Inc. v. Coastal Power Production Co.*, 517 F.3d 235 (5th Cir. 2008), provides no support for Petitioners' position. The district court in *Walk Haydel* erred by granting only very limited jurisdictional discovery while simultaneously requiring the plaintiff to make out more than a prima facie case for jurisdiction. *See id.* at 242. *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981) is also inapposite. In *Williamson*, the issue of jurisdictional discovery related to the court's subject matter jurisdiction – not its personal jurisdiction over the defendant. *See id.* at 409, 413-14.

In any event, the lower court's discretionary decision not to allow for jurisdictional discovery in this case does not present a compelling reason to warrant this Court's review.

CONCLUSION

Because the Fifth Circuit correctly determined that Texas lacks personal jurisdiction over Respondent Connie Grenemyer in this case, and because no other compelling reasons exist to warrant this Court's intervention, Respondent respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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